

STATE OF MICHIGAN
COURT OF APPEALS

WEATHERHEAD & SONS, INC.,

Plaintiff/Counterdefendant-
Appellee,

v

GARY HOPKINS,

Defendant/Counterplaintiff-
Appellant.

UNPUBLISHED

May 13, 2003

No. 236818

Kent Circuit Court

LC No. 00-012730-CK

Before: Talbot, P.J., and White and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order granting summary disposition in favor of plaintiff pursuant to MCR 2.116(C)(10). We reverse.

I. Basic Facts and Procedural History

This case arises out of a contract to install a new roof system on defendant's home. Defendant and his wife own a home in East Grand Rapids, Michigan. Plaintiff is a Michigan corporation in the business of performing residential contracting and home improvement work, including roof and shingle repairs and replacement. In August 2000, plaintiff and defendant entered into a written contract under which plaintiff was to re-roof defendant's house for a total contract price of \$26,400. Plaintiff completed the installation of defendant's new roof. Thereafter, defendant failed to make full payment under the terms of the contract. As a result, plaintiff recorded a construction lien on defendant's property and filed this suit for enforcement of the construction lien, unjust enrichment, and breach of contract.

In response, defendant filed a counterclaim against plaintiff for breach of contract, breach of warranty, and Consumer Protection Act violations. Forming the basis of his claims are defendant's allegations that in installing the roofing materials, plaintiff failed to install per the manufacturer's specifications by (1) failing to leave the proper amount of shingle exposed, (2) failing to properly install the ice shield, (3) failing to properly install the drip-edge material, and (4) failing to properly vent the roof. Defendant further claimed that plaintiff breached the contract by installing shingles of different lot numbers, which resulted in a roof with different color shingles that is aesthetically displeasing and not functional. Defendant asserted that due to

plaintiff's failure to properly install the roof, it leaks and has resulted in further damage to defendant's property.

Plaintiff filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that inspections performed by the supplier, ABC Supply Company, Inc., and the manufacturer, Amcraft Building Products, Inc., revealed that there were no genuine issues of material fact with regard to the proper installation of defendant's roof. Plaintiff presented an affidavit that the roof was installed in a good and workmanlike manner in compliance with industry and manufacturer standards, that there was no connection between the water infiltration and plaintiff's installation of the roof, and that the materials, including the shingles, were under manufacturer warranty if defendant had a problem or complaint. Plaintiff therefore concluded that it was entitled to summary disposition as a matter of law.

At the hearing on plaintiff's motion for summary disposition, defendant appeared in pro per seeking to have an expert witness testify at the hearing in opposition to plaintiff's motion. The trial court denied defendant's request, ruling that, under the court rule, defendant was required to present documentary evidence. At the conclusion of the hearing, the trial court granted plaintiff's motion for summary disposition, finding that defendant had failed to present legally sufficient facts showing that there existed a genuine issue for trial. Defendant now appeals.

II. Standard of Review

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* In *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999) the Supreme Court, quoting from *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the following standards to apply in reviewing a motion brought pursuant to MCR 2.116(C)(10):

“In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

“In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Glove Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115;

469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass’n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).”

“A litigant’s mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10).” *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). Instead, a litigant opposing a motion for summary disposition under this subrule must present substantively admissible evidence to the trial court prior to its decision on the motion, which creates a genuine issue of material fact. *Id.*

III. Analysis

Defendant argues that the trial court erred in granting plaintiff’s motion for summary disposition under MCR 2.116(C)(10). We agree. A motion for summary disposition based on the lack of material factual dispute must be supported by documentary evidence, affidavits, pleadings, depositions, or admissions, and must specifically identify the matters having no disputed material factual issues. *Id.* at 120-121. An affidavit submitted in support of or in opposition to a motion must be made on personal knowledge and affirmatively show that the affiant, if sworn as a witness, could testify competently to the facts stated in the affidavit. MCR 2.119(B)(1)(a) and (c).

Plaintiff provided the affidavit of its corporate president, Edward Weatherhead, in support of its motion for summary disposition, which complied with these requirements.¹ Weatherhead’s affidavit indicated that he supervised and observed the work performed at defendant’s home and believed it to have been performed in a good and workmanlike manner, in compliance with industry and manufacturer standards. The affidavit also included the hearsay assertion that the manufacturer and supplier verified that the highest quality labor and materials were provided and approved the roof installation as compliant with industry and manufacturer standards. Weatherhead further averred that the water infiltration experienced by defendant was due to inadequate insulation in defendant’s residence, rather than faulty installation or workmanship by plaintiff, and that the roof system, including the shingles, was protected under warranty. However, there was nothing in the affidavit indicating how plaintiff came to the conclusion that it was the insulation that caused the damage. Thus, the trial court properly considered plaintiff’s affidavit.

Accordingly, the burden shifted to defendant, as the party opposing the motion, to establish by documentary evidence that a genuine issue of material fact existed. *Smith, supra*. To meet this burden, defendant may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings and provide substantively admissible evidence setting forth specific facts showing that a genuine issue of material fact exists. *Smith, supra*. Our review of the record reveals that defendant comported with these requirements.

¹ We note that although plaintiff’s affidavit was sufficient, we would have preferred it have more particularity with regard to its factual support.

Defendant presented evidence in response to plaintiff's motion for summary disposition that raised a genuine issue of fact whether plaintiff's installation of the roof was deficient and non-workmanlike, such that it resulted in extensive and damaging water infiltration into defendant's home. Defendant kept a close eye on the installation of the roof, and his affidavit was based on personal knowledge and observation. For example, defendant's affidavit stated that "Weatherhead & Sons did not follow venting instructions, exposure instructions, nor did they follow nailing recommendations for ice & water shield." Defendant's affidavit further stated that while the product "Ice & Water Shield" was written into the contract, plaintiff applied "Weather Watch" onto the roof. Defendant supported his affidavit with documentary evidence, including the parties' contract, billing invoices, and photographs depicting water infiltration into his home.

Defendant's numerous photographs were labeled and dated, and evidence serious and extensive water infiltration into his home after the roof's completion, and resulting damage to the interior of the home. The photographs showed, for example, water dripping down interior walls of the home; water coming into the front bay window of the home; water damage to the wall, baseboard moldings and carpeting of a bedroom; water damage to the ceiling of another bedroom; water coming in through the ceiling of a closet in the garage and, on the exterior of the home, shingles popping up on the roof; allegedly improper exposure length of shingles (7 1/4" versus 6"); and varied, rather than uniformly colored shingles.

Further, Weatherhead stated in his affidavit that the water infiltration into defendant's home was a result of inadequate insulation in the attic. However, there is no evidence to support plaintiff's assertion that inadequate insulation could result in water infiltration and leaking into numerous areas of defendant's home. Defendant asserted below that his attic was insulated with nine inches of insulation, and nothing in the record contradicts that. Defendant further asserted that prior to the installation of the new roof system by plaintiff, the roof did not leak. Therefore, because defendant provided documentary evidence showing that a genuine issue of material fact existed for trial, we find that summary disposition was improperly granted to plaintiff.

Due to the above resolution of the issue, defendant's argument that the trial court erred in refusing to allow the live testimony of defendant's expert need not be addressed.

Reversed and remanded. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Helene N. White
/s/ Christopher M. Murray